



January 30, 2001

Ms. Janice Mullenix  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2001-0340

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143739.

The Texas Department of Transportation (the "department") received a request for information relating to Railroad Crossing DOT No. 024554W located in Coryell County, Texas. You inform us that some of the requested information is already public and will be released, but claim that the remaining requested information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 encompasses information that is protected by civil discovery privileges. *See* Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980). You claim that the requested information is excepted from disclosure under section 552.111 because it would be privileged from discovery under section 409 of title 23 of the United States Code. Section 409 provides as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [sic] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130,

144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. Federal courts have stated that section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally-required record-keeping from being used for purposes of private litigation. *See Harrison v. Burlington N. R.R. Co.*, 965 F.2d 155, 160 (7<sup>th</sup> Cir. 1992); *Robertson v. Union Pac. R.R. Co.*, 954 F.2d 1433, 1435 (8<sup>th</sup> Cir. 1992).

You characterize the information that the department seeks to withhold as intra-agency memoranda. You further assert that section 409 of title 23 would protect this information from discovery in civil litigation. You therefore contend that the requested information is excepted from disclosure under section 552.111. We first note that some of the submitted information appears to be communications to and from third parties. Furthermore, you have not indicated whether these third parties were acting as consultants in this correspondence. Therefore, we cannot find that these third-party communications are *interagency or intra-agency* memoranda or letters excepted under section 552.111. *See* Open Records Decision Nos. 474 (1987), 462 (1987). The remainder of the submitted information does appear to constitute interagency and intra-agency communications. With respect to this information, we find, based on your representations and our review of the information in question, that section 409 of title 23 of the United States Code would protect this information from discovery in civil litigation; therefore, it is excepted from disclosure under section 552.111 of the Government Code. We have marked the information that you have demonstrated to be excepted under section 552.111. The remainder of the information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 143739

Encl. Submitted documents

cc: Mr. Mark W. Long  
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(w/o enclosures)